Supreme Court, U.S.
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No. 99-44

IN THE
Supreme Court of the United States

CHRIS PARADISSIOTIS,

Petitioner,

v.

ROBERT E. RUBIN,
Secretary of the United States Department of Treasury;
R. RICHARD NEWCOMB,
Director of the Office of Foreign Assets Control,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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STATEMENT

Construing the Executive's use of Specially Designated National ("SDN") lists to assume control over selected foreign citizens' private property and contract rights is a matter of first impression. Petitioner was among the first 21 individuals listed in 1991. Since then, Respondent has used this power expansively in the international community. Respondent's Brief in Opposition ("Opp'n Br.") asks the Supreme Court to deny certiorari and to thereby allow the Fifth Circuit's decision to stand. It would be cited as the sole judicial benchmark, permitting the Executive arbitrary and discretionary power to use SDN lists against selected foreign individuals as a tool to enforce foreign policy. The authors of the Constitution sought to prevent these same legislative and executive tools, then being used in Britain, by prohibiting *ex post facto* laws and bills of attainder. The Constitution also provided due process, legal representation and judicial review to protect individuals' freedom and private property from law enforcement without standards. One issue encompasses all four of the legal issues identified in the briefs:

> Do the President's foreign policy powers trump the judicial and constitutional protections otherwise applicable to foreign citizens?

Respondent claims authority and power to designate Petitioner and to freeze his personal assets, destroy his stock options, terminate his contracts, and criminalize his non-Libyan transactions (past and future) related to any U.S. person or asset, without judicial review of whether his conduct is wrongful. The Fifth Circuit accepted Respondent's exercise of arbitrary and discretionary power over Petitioner's personal assets as being justified by the President's foreign policy of "isolating Libya by severing its economic ties to the rest of the world." [Opp'n Br. at 4, fn. 1.] In this instance, policy deviates from law. First, the rest of the world did not consent to prohibit economic ties. Moreover, neither the

President's Executive Orders nor Respondent's Libyan Sanctions Regulations order the blocking of personal assets of foreign citizens who contract with or are employed by European companies that Respondent identifies as being affiliated with the Government of Libya.

But for the selective naming of Petitioner to the "SDN" list, there is no law authorizing the taking of his personal property or criminalizing his private affairs. The law blocks assets of the Government of Libya. Case law, discussed *infra*, establishes that blocking orders are not permitted against any private property except the assets of the sanctioned country. Respondent avoids such judicial decisions by administrative fiat with the list, applying the sanctions to Petitioner's personal property by simply defining him to be the "Government of Libya." Respondent opposes certiorari with excerpts from the Fifth Circuit decision that would define the scope of authority bestowed upon Respondent according to these principles:

> An Executive agency has the power to authorize itself to selectively designate to lists any foreign citizen even *suspected* of engaging in conduct, although not prohibited by U.S. or other laws, that is not in accordance with the President's foreign *policy* of impeding business with the sanctioned country. [Opp'n Br. at 5.] The foreign citizen once listed is deprived of all of his personal property held in the U.S. and all contract rights with U.S. persons, without notice or due process or appeal. [Opp'n Br. at 4, n. 1.] Any transaction by a listed individual with a U.S. person, which is otherwise legal except for the list, is declared by complex regulations to be a criminal and civil violation for both the designated person and the U.S. person with whom he deals, even if the transaction occurred before he was listed, [Opp'n Br. at 7-8], such as "selling him a McDonald's hamburger."

> [Pl.'s Mem. & Resp. Defs.' Mot. Dismiss, Ex. 4 at 2.]
>
> The agency need not publish any criteria or standards for qualification to the list, for removal from the list, or for licensing exceptions from the punishment. The punishment resulting from designation can only be escaped pursuant to a completely arbitrary scheme allowing applications for licenses from the agency that made the designation.
>
> The agency's regulations can prohibit the listed foreign citizen from obtaining legal representation by a U.S. attorney for conducting business transactions whether or not related to Libya. The only means for authorizing the legal services requires the attorney first to disclose to the agency information obtained through privileged communications in a discretionary process seeking a license, the granting of which has no standards, no time limits for response, and no certainty and rests at the whim of a faceless bureaucrat who has no congressional or judicial oversight.

CASE OF FIRST IMPRESSION

The SDN list merely consists of names published in the Federal Register. Respondent applies this listing of Petitioner's name through a definition of "Government of Libya" in the Libyan Sanctions Regulations. The effect is as if the President issued the Executive Orders against Petitioner and his personal property. Contrary to Respondent's implication, Petitioner is not challenging prior courts' rulings that uphold the blocking of assets of a sanctioned foreign country or "its nationals." *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Milena Ship Management Co. v. Newcomb*, 995 F.2d 620 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994). Respondent does not reveal how those

cases are distinguished from the case of Petitioner. All cases cited by Respondent that uphold blocking pursuant to IEEPA, or its predecessor TWEA, address the blocking of assets in which the sanctioned government (or its nationals if proscribed by the particular sanction regime) owned an interest. In *Milena Ship*, for instance, the Office of Foreign Assets Control was permitted to presume ownership by the Yugoslavian government to justify blocking, but the ship owner would have been permitted upon judicial review to obtain a release of the vessel if the court had not held: "JOP is not a private company . . . we conclude that the Yugoslavian government retains an interest in JOP." *Milena Ship*, 995 F.2d at 625.

The Libyan Sanctions Regulations and Yugoslavian Sanctions Regulations are written with the same language and do not impose blocking orders against the assets of the nationals of the sanctioned country. The IEEPA authorizes the President to order emergency sanctions against "any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B) [cited at Opp'n Br. at 10.] Libyan Sanctions Regulations do not prohibit transactions with, or impose blocking on assets of any national — even Libyan nationals — as authorized by the IEEPA, except "to the extent" they act on behalf of the Government of Libya. Respondent cites language of *Regan v. Wald*, 468 U.S. 422, 243 (1984), and *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 875 (D.C. Cir. 1984), to assert judicial approval of its interpretation that it has "undisputed power to deny [a designated Cuban national] permission to engage in commercial transactions." [Opp'n Br. at 9, n. 5.] Those cases were rendered under the Cuban Sanctions Regulations that do order blocking of assets of all nationals of Cuba. 31 C.F.R. §§ 515.201, .302 (1974). Petitioner is not a national of Libya. No case has considered the blocking of personal assets of a person not a national of the sanctioned country except *Real v. Simon*, 510 F.2d 557, *rehearing denied*, 514 F.2d 738 (5th Cir. 1975). In *Real*, the

non-Cuban nationals were entitled to unblock inherited assets, because the deceased Cuban national no longer had a present interest in the assets. *Real*, 510 F.2d at 564.

> [T]he issue is whether there is a sufficient interest on the part of the Cuban government or a Cuban national which would justify or authorize the application [of the regulations] . . . . We hold that such a determination by the United States is arbitrary and without basis in either the language or the purpose of the [TWEA] . . . . The Government recognizes that a Cuban interest must pertain to the assets in order to justify blocking, and so by administrative fiat has decreed that deceased persons have an interest in their assets, thus justifying the blocking . . . .

Id.

APPLICATION OF SDN LIST CREATES A BILL OF ATTAINDER

Respondent avoids the judicial review required by *Milena Ship* and *Real*, which would unblock assets proven to be privately owned, by defining Petitioner to be the "Government of Libya." By administrative fiat, Petitioner's personal assets become "Government of Libya" assets. This application, which is an inescapable conviction upon designation, creates the banned bill of attainder when the SDN is an individual (if the courts follow Respondent's interpretations of the IEEPA "or its nationals" language and its regulatory "to the extent" language). Judicial review to avoid the bill of attainder ban requires an impartial process to measure Petitioner's conduct against a standard of prohibited conduct and "must, of course, be something more than the mechanical determination of whether the accused is indeed a member . . . that a law-making process has already condemned without trial safeguards. . . ." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-4 at 642 (2d ed. 1988).

Respondent and the Fifth Circuit provided no case authority, but the same factual justification, for concluding that the blocking and destruction of Petitioner's personal assets fails the bill of attainder elements of both "legislative act" and "punishment." To be exempt from the bill of attainder ban, Respondent asserted that, rather than a legislative act, the designation "of Petitioner as an SDN is simply a way for the agency . . . to provide notice of his status . . ." and "that mere listing does not inflict . . . punishment." [Opp'n Br. 7-8.] Prior decisions of this Court would conclude that actions to deprive individuals of their personal property "for conduct lawful when engaged in" constitute punishment. TRIBE, *supra* at 642 n.9, 643.

Respondent now admits that whether publication of Petitioner's name to the list was mere notice or whether it implemented a legislative act causing deprivation of his personal assets is a "fact-specific determination." [Opp'n Br. at 8.] The Fifth Circuit refused even to review the District Court's refusal to consider the fact issues that should have prevented summary judgment. [Opp'n Br. at 4.] Respondent is well aware that its method of applying the SDN list has a profound economic and liberty effect against the individual whose name is listed. Thousands of individuals not designated to the list are known to Respondent to be employed by, and serve as directors of, European companies in which the Government of Libya has an interest. Neither the personal assets of those individuals, nor the personal assets of the Libyan nationals who work for the Government of Libya, are blocked under the Executive Orders and Libyan Sanction Regulations. The designation of Petitioner to the SDN list, as applied, was not mere notice. The Supreme Court has stated that Executive acts of rule making are "legislative acts." *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 144 (1950) (Black, J. concurring).

DEFERENCE TO RESPONDENT'S INTERPRETATION

Respondent seeks to have it both ways with its varying interpretations of the purpose of the SDN list. Respondent argued that the list merely constitutes "notice" for the purpose of avoiding the bill of attainder prohibition, but also objected to Petitioner's position that the SDN list simply constitutes "notice" to U.S. persons of potential Libyan agents. The Libyan Sanctions Regulations prohibit conduct by U.S. persons, not foreign citizens. A significant omission exists in Respondent's Brief in Opposition where it implies that *all* trade and financial transactions with Libyan companies are prohibited. [Opp'n Br. at 4]. Instead, only *U.S. Persons* are prohibited from engaging in such transactions. The list would actually serve as notice to U.S. persons if the named individuals, like Petitioner, had the right to judicial review by an independent trier of fact to determine whether his personal retirement funds are not "property of controlled entities of Libya." [Opp'n Br. at 4, n. 1.]

The Fifth Circuit concluded that Respondent's disregard of the limiting words "to the extent" was appropriate and "represents the only practical interpretation," [Opp'n Br. at 5 and 10], stating also that "OFAC's interpretation . . . allow[s] it to block all property of controlled entities of Libya without determining whether the particular transaction at issue will ultimately benefit or serve the interest of the Government of Libya." [Opp'n Br. at 4, n.1.] A presumption for blocking is appropriate, as described in the facts of *Milena Ship, supra*, but Respondent changed the regulatory scheme after *Milena Ship* by defining Petitioner to be the government to avoid the judicial review. One need only to read the Fifth Circuit opinion to see that Respondent's interpretations were given deference to avoid giving meaning to the regulatory and statutory words of limitation. The Fifth Circuit concurred based upon Respondent's stated policy for its interpretation rather than the plain language review required when serious

constitutional issues are at stake. *Williams v. Babbitt*, 115 F.3d 657, 661 (9th Cir. 1997).

ACCESS-TO-COUNSEL

Respondent's first sentence in replying to the access-to-counsel issue, [Opp'n Br. at 8], is misleading and tells only half the story. The Libyan Sanctions Regulations authorize legal representation to the "Government of Libya" by a standing license for only limited purposes, such as explaining U.S. laws and defending actions filed in the U.S. against a SDN, *provided that* such services do not "facilitate transactions." 31 C.F.R. § 550.517(b). Payment is prohibited for *all* legal services unless the attorney obtains a special license to approve the attorney, at the discretion of Respondent. 31 C.F.R. § 550.517(a). Respondent denied Petitioner's license requests for (i) access to U.S. legal counsel for Petitioner related to business transactions for his personal affairs, (ii) for his employer's business unrelated to Libya, and (iii) for his work as President of a company owned exclusively by a U.S. corporation that is not a SDN.

Respondent cites only two new cases in its brief. Respondent provides a comparative cite to *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), for its position that the Executive may legislate a prohibition against payments to lawyers. [Opp'n Br. at 8.] In *Caplin*, attorneys challenged the constitutionality of the forfeiture statute, because it resulted in forfeiture of all money (drug proceeds) that the drug law offender possessed to pay his attorneys. *Caplin* does not support Respondent's position that it has the right by regulation to restrict access to U.S. legal counsel for designated individuals by an arbitrary licensing process. To the contrary, *Caplin* acknowledged one's right of access-to-counsel by paying one's lawyer is "a constitutionally protected right." *Caplin*, 491 U.S. at 628.

Respondent's second new citation, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 333-34 (1985), is also distinguishable. In *Walters*, veterans organizations

were challenging a law passed by Congress that limited payment of attorneys to $10 in challenging the denial of veterans benefits. *Walters* determined that the due process rights of veterans are not denied in such an instance where (i) the government is paternally protecting the individual, (ii) judicial procedures exist with sufficient safeguards established to reduce the risk of an erroneous deprivation of private interests, (iii) competent representatives are provided, and (iv) the independent trier of fact is duty bound to shift the burden of proof against the government in favor of the individual. *Walters*, 473 U.S. 333 at 321, 332-33. In applying the flexible due process analysis, *Walters* upheld this statute limiting access to legal counsel with the same analysis that *Fleming v. Nester*, 363 U.S. 603 (1960), refused to afford an alien relief on a bill of attainder analysis. In *Fleming v. Nester*, the Court determined that legislation restricting social security benefits was not "punishment" to constitute a bill of attainder, although the alien was afforded review, because social security is a governmental privilege and not a private property ownership right. *Walters* held that veterans benefits, although a type of property interest, constituted a governmentally offered privilege rather than a personal property interest. *Compare Walters*, 473 U.S. at 333 *with Goldberg v. Kelly*, 397 U.S. 254 (1970), (finding that a welfare recipient subjected to possible termination of subsistence benefits is entitled to be represented by an attorney and that a statute limiting counsel was unconstitutional).

Walters also addressed the First Amendment right to counsel that is asserted by Petitioner. Although *Walters* denied that the veterans were being denied their First Amendment right to representation, the ruling was on the basis that the veterans are afforded a fair and "meaningful" hearing process. *Walters*, 473 U.S. at 335. Respondent only offered Petitioner the opportunity to submit more license requests to Respondent, which arbitrarily acts after months of delay. "What is at stake is the right of an individual to

consult an attorney of choice in connection with the Government. In my opinion, that right is firmly protected by the Due Process Clause of the Fifth Amendment and by the First Amendment." *Walters*, 473 U.S. at 368 (Stevens, J., dissenting).

Noteworthy is the fact that Respondent, both before the Fifth Circuit and before this Court, refused to address or distinguish *Amusement Devices Ass'n v. Ohio*, 443 F. Supp. 1040 (S.D. Ohio 1977), the most directly applicable access-to-counsel case. Respondent also failed to address the right to an attorney and the appurtenant privilege afforded foreign persons in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

Finally, Respondent mischaracterizes Petitioner's analysis of *Bernstein v. United States Department of Justice*, 176 F.3d 1132 (9th Cir. 1999). [Opp'n Br. at 9, n. 5.] Petitioner cited *Bernstein* as the most directly applicable factual case in the protection of First Amendment rights where a federal court analyzed an arbitrary licensing scheme as used by Respondent to deny Petitioner judicial review. Accountability of Respondent is nonexistent in Respondent's regulatory scheme for Petitioner. Respondent cites *Walters*, a case that was only addressing a process for reduction of benefits with no possibility for imposing criminal penalties or taking personal property, which holds that legislation may restrict access-to-counsel where the proceeding provides other adequate procedural safeguards to protect the interest of the individual. *Bernstein* analyzed extensively that an arbitrary licensing scheme that affords a government agency unbridled discretion to limit First Amendment rights was unconstitutional unless the scheme affords judicial review to determine whether the individual's conduct was wrongful. There is no wrongful conduct of Petitioner, and thus any judicial review would not find a basis to merit the deprivation of personal property.

Respectfully submitted,

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